

Stiffing of legal aid undermines justice

Just a month from now, March 18, marks the 40th anniversary of the landmark right-to-counsel decision in *Gideon vs. Wainwright*.

The decision is famous for its rare Supreme Court unanimity in overruling the then-controlling precedent of *Betts vs. Brady*, and its evident pride in the fairness of our justice system. "The right of

William J. LEAHY

one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours," the court said in 1963.

The decision soon became etched in U.S. history by publication of Anthony Lewis' best-selling "*Gideon's Trumpet*," and by a popular movie of the same name, starring Henry Fonda as Clarence Earl Gideon. Amid all the acclamation and self-congratulation, few people paid heed to Lewis' warning that fulfillment of the *Gideon* promise would hardly be self-executing:

"It will be an enormous social task to bring to life the dream of *Gideon* — the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense."

Likewise, few people then or now were aware of the critical role which Massachusetts lawyers — specifically, Massachusetts prosecutors — played in this historic decision.

Here's what happened: The Florida attorney general sent a routine letter to his counterparts in other states requesting *amicus* assistance. Walter Mondale, then the Minnesota attorney general, disagreed vigorously with the position of Florida officials, and told them so. He then sent a copy of his correspondence to several other attorneys general, including Edward J. McCormack Jr. in Massachusetts, who passed it along to the chief of his division of civil rights and civil liberties, Gerald A. Berlin.

It was Berlin who decided to write in support of *Gideon* and the right to counsel. He was aided by the lobbying assistance of McCormack and Mondale. The result was nothing short of spectacular.

"Florida, supported by two other states, has asked that *Betts vs. Brady* be left intact. Twenty-two states, as friends of the court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree," the high court ruled.

At the time of the *Gideon* decision, Massachusetts had not only required the assignment of counsel for poor people in felony cases but already had a statewide public-defender agency, the Massachusetts Defenders Committee, in 1960.

Thus, by the time *Gideon* became the law of the land, Massa-

chusetts had already far surpassed the minimal compliance required by the Constitution. Massachusetts then stood as an enlightened model for states less protective of individual liberty.

How dramatically and how sadly the times have changed since 1963. This commonwealth has fallen precipitously compared with other states in the rates it pays to counsel for the poor.

Therefore, more and more attorneys have become unavailable for court assignments, or have removed themselves from state certification lists.

The result is an escalating constitutional crisis in which the right of the poor to be represented by counsel is being undermined by the state's unwillingness to pay for legal representation which the Constitution and state laws require.

At its meeting last Dec. 11, the Committee for Public Counsel Services (CPCS) voted unanimously to authorize hourly rates of \$120 for murder cases; \$90 for most other Superior Court cases and \$60 for district court criminal cases (which account for approximately 60 percent of CPCS assigned counsel cases).

It bears emphasis that these authorized rates cannot, by statute, become effective in the absence of an appropriation passed by the Legislature and signed by the governor. The new authorized rates are far higher than the \$30/\$39/\$54 limits imposed annually since fiscal 1997.

Massachusetts now lags far behind other states in its funding of the right to competent counsel for poor people. When assigned counsel in the federal district courts of Boston or Worcester or Springfield are paid at the rate of \$90 per hour, while their CPCS counterpart down the street is paid \$39 per hour to defend against life felonies, can anyone doubt that the state counsel system is fast approaching crisis? When lawyers are paid \$30 per hour to represent children in delinquency cases, is anyone surprised that cases are being continued solely due to the lack of attorneys who can represent people in need at this compensation level?

This state pays hundreds of dollars per hour for the legal representation of highly placed officials. Private attorneys may charge five to 10 or more times the CPCS hourly rate when providing advice or legal counsel in matters of business or commerce. Yet when the liberty or family interests of poor children and adults are at stake, the great principles of equality and fair treatment which inspired the *Gideon* decision appear to be forgotten.

Massachusetts, which once breathed life into the Sixth Amendment right to counsel for poor people, is now suffocating that right.

William J. Leahy is chief counsel of the Committee for Public Counsel Services.

The great principles of equality and fair treatment which inspired the *Gideon* decision in 1963 appear to be forgotten.